Supreme Court, U.S.
FILED
OCT 18 1999

No. 99-296

In the Supreme Court of the United States

DEBRA WALKER, ET AL., PETITIONERS

v.

CITY OF MESQUITE, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the remedial order in this case, requiring that public housing units be developed in predominantly non-minority residential areas, is narrowly tailored to remedy the unconstitutional exclusion of public housing from those areas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 169 F.3d 973. The opinions of the district court (Pet. App. 36-65, 66-206) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1999. A petition for rehearing was denied on May 19, 1999 (Pet. App. 210-212). The petition for a writ of certiorari was filed on August 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The decision below resulted from an appeal from two orders entered in consolidated actions. The first is a final judgment in an action brought by respondents,

Highlands of McKamy IV & V Community Improvement Association v. *Dallas Housing Authority*.[1] The second is a declaratory judgment in an action initiated by petitioners, *Walker* v. *City of Mesquite* (hereinafter the *Walker* litigation).

1. a. *Walker* is a long-standing class action housing discrimination case in which the district court held the Housing Authority of the City of Dallas (DHA), the City of Dallas, and the Department of Housing and Urban Development (HUD) liable for unconstitutional racial discrimination and segregation in low-income housing programs in the City of Dallas and its suburbs. See *Walker* v. *HUD*, 734 F. Supp. 1289 (N.D. Tex. 1989) (*Walker III*).

From its creation in 1938, DHA operated a *de jure* segregated public housing program, with the express purpose of maintaining racial and ethnic residential segregation. In accordance with its discriminatory policies, DHA developed separate housing projects for whites, Hispanics, and African Americans, and excluded most public housing projects for families from white neighborhoods. *Walker III*, 734 F. Supp. at 1293-1297; Pet. App. 72-83.[2] The district court found that "[f]rom its beginning, the primary purpose of DHA's public housing program was to prevent blacks from moving into white areas of this city." *Walker III*, 734 F. Supp. at 1293. As the court of appeals wrote:

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[1] Although the Department of Housing and Urban Development is also a respondent in this case, we refer to the plaintiffs in the *Highlands* action as "respondents."

[2] Public housing refers to low-income housing constructed and maintained with loans and annual contribution contracts from HUD (or its predecessor agencies). Public housing projects generally are developed and owned by a local public housing authority, such as DHA. See 42 U.S.C. 1437b-1437d.

> The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation. * * * Virtually all non-elderly public housing units were constructed in minority areas of Dallas. No new public housing units were built between 1955 and 1989 at least in part for fear that they might be located in white areas. Tenant selection and assignment procedures for public housing units were crafted and administered to maintain racially segregated projects.

Pet. App. 4-5 (footnotes omitted). In 1994, over 95% (6,133 of 6,411) of DHA's public housing units for families, and over 92% (2,876 of 3,116) of the black families residing in public housing operated by DHA were located in predominantly black or minority areas in which the poverty rate exceeded 40%. Pet. App. 86; see *id.* at 4 n.4. The largest of DHA's public housing projects was the West Dallas Project. Built in the early 1950's to solve the "Negro housing problem," West Dallas, with 3,500 units, was one of the largest concentrations of public housing in the country. *Id.* at 5 n.5, 74-78.

In addition to discrimination in its public housing program, DHA operated its Section 8 certificate and voucher programs to discourage African Americans from moving into white areas of metropolitan Dallas. Pet. App. 5, 84-85.[3] In 1994, only 21% of black Section 8 households lived in predominantly white neighbor-

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[3] Under the Section 8 certificate and voucher programs, qualified low-income individuals and families rent housing units from private owners, and have their rents subsidized, generally through the local public housing authority, with funds provided by HUD. See 42 U.S.C. 1437f(*o*).

hoods, compared with 45% of white Section 8 households. *Id.* at 224.

b. In 1987, the district court approved a consent decree settling the *Walker* litigation. Pet. App. 3-4. The 1987 consent decree required the demolition of approximately 2,600 units of public housing at West Dallas, and the one-for-one replacement of those units with new public housing and Section 8 certificates and vouchers. *Id.* at 5. DHA was required to build 100 units of public housing in predominantly white areas and to create a Housing Mobility Division to assist black and other minority families to use Section 8 vouchers and certificates to move to non-minority areas of Dallas and the suburbs. *Id.* at 6; see *Walker III*, 734 F. Supp. at 1255. After DHA failed to comply with its obligations under the consent decree, and other intervening events, see *Walker* v. *HUD*, 912 F.2d 819 (5th Cir. 1990), the district court vacated the consent decree in 1992. Pet. App. 7.

The district court then entered remedial orders against DHA in 1995 (Pet. App. 213-228) and against HUD in 1996 (C.A. R.E. Tab 6).[4] As a remedy for the

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[4] HUD appealed from the entry of the 1996 Remedial Order Affecting HUD on both liability and remedy grounds, but withdrew that appeal after reaching a settlement agreement with the *Walker* plaintiffs. The Modified Remedial Order Affecting HUD (Supp. C.A. R.E. Tab 2) was entered by the district court on December 5, 1997. The Modified Remedial Order retains HUD's core obligations, along with a number of other HUD remedial obligations, but also places express limits on the court's authority to impose any additional burdens upon HUD beyond those set forth in the order's terms. In particular, the Modified Order states that while the court may require HUD in specified circumstances to provide "comparable relief" in lieu of the relief the modified decree requires by its terms, "[s]uch comparable relief shall not, however, require the Federal Defendants to provide or expend

continuing concentration of public housing in predominantly black or minority concentrated areas (Pet. App. 213), the DHA remedial order calls for the demolition of at least 2,630 public housing units at West Dallas and the development of 2,807 replacement housing units, consisting of 774 public housing units and 2,033 Section 8 certificates and vouchers. *Id.* at 214. In addition, DHA is required to provide 3,205 additional housing units in predominantly white areas. *Id.* at 214-215. As contemplated by the remedial orders (*id.* at 216- 217), HUD intends to provide funding for all of the 3,205 additional units through the Section 8 program. *Id.* at 9 n.10. The DHA remedy order provides that, except for units used in the reconfiguration of the West Dallas project, no public housing may be built in a non-predominantly white area until the 3,205 units are provided in predominantly white areas. *Id.* at 214.

As a remedy for the continued concentration of black Section 8 users in predominantly black or racially concentrated or low income areas, the DHA remedial order requires DHA to provide mobility services to African American applicants and residents to assist them in using Section 8 certificates and vouchers in predominantly white areas of Dallas and its suburbs. Pet. App. 224-225.

Substantial parts of the remedy have already been implemented. The demolition of the requisite units at West Dallas has been accomplished. Of the 774 units of public housing, 200 units have been designated for use in the reconfiguration of West Dallas, 100 units have

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funds in an amount greater than that expressly agreed to by the Federal Defendants under the terms of this Remedial Order." Supp. C.A. R.E. Tab 2, at 21; see also *id.* at 19 ("The Court may not increase the financial burden of HUD.").

been constructed, and 75 units are under development in predominantly white neighborhoods.[5] But even after the demolition at West Dallas and the completion of the first 100 units of public housing in a predominantly white area, there were still approximately 3,500 units of public housing in predominantly minority areas and only 353 units in predominantly white areas. Pet. App. 7-9 & nn.8-12.

2. Respondents' action, filed in 1996, concerns two properties that DHA proposed to acquire for the purpose of constructing two 40-unit public housing projects in predominantly white areas pursuant to its obligations under the DHA Remedial Order in *Walker*. Respondents, whose homes are in the vicinity of the two sites, contended that DHA's selection of the sites violated their rights under the Fourteenth Amendment and sought a temporary restraining order and permanent injunction to prevent DHA from acquiring or constructing public housing on the sites. C.A. R.E. Tab 8, at 6-7, 13-15. Respondents expressly declined to challenge the district court's findings of intentional discrimination by DHA. C.A. R.E. Tab 8, at 10. Nor did they challenge the suitability of the two sites for public housing. See Pet. App. 47-49, 69-71. Rather, they alleged that the portion of the *Walker* remedy that requires DHA to develop public housing in predominantly white areas is unconstitutional because it is race-conscious and is "neither the most effective and flexible way in which to remedy past discrimination, nor is it the least intrusive remedy with respect to the impact that the remedy will have on the rights of

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[5] HUD recently submitted its proposed plan for the additional 3,205 units, but the district court has not yet acted to approve or disapprove that plan.

innocent third parties such as Plaintiffs." C.A. R.E. Tab 8, at 10.

3. Respondents' action was consolidated with the *Walker* litigation, and petitioners filed a supplemental complaint seeking a declaratory judgment that the DHA Remedial Order is constitutional and an injunction against efforts to obstruct its implementation. C.A. R.E. Tab 9. After an evidentiary hearing, the district court approved the sites, granted petitioners' request for declaratory relief, and denied relief to respondents.

The district court found that respondents had failed to prove that there would be any decline in property values in their neighborhoods as a result of the construction of public housing on the two sites, Pet. App. 122-133, and that any other adverse effects of the construction of public housing on the two sites would be limited and diffuse, *id.* at 117-121. The district court found that, although DHA had neglected its public housing properties in the past, *id.* at 124, the present DHA administration had "not generally failed to competently develop, maintain, or manage its units," *id.* at 122. Moreover, the court found, the DHA remedial order contained provisions that would prevent such neglect of the new public housing by either DHA or by the City of Dallas, and DHA was taking steps to minimize the impact of the new public housing on surrounding properties. *Id.* at 119-124.

The district court also found that the use of Section 8 certificates and vouchers would not fully remedy the public housing violation. Pet. App. 134-168. In particular, the court found that many landlords in predominantly white areas refused to accept vouchers or certificates, that there was a shortage of three and four-bedroom units, a shortage of units at rents permitted

under the Section 8 program, and other barriers to use of Section 8 in predominantly white areas, such as high security deposits and stringent employment requirements. *Id.* at 140-141, 144-147. The district court found that 80% of DHA's Section 8 tenants were unable to find housing in predominantly white areas, despite DHA's mobility counseling and outreach to landlords. *Id.* at 147.

4. Respondents appealed, and the court of appeals granted their motion for a stay of construction on the sites pending appeal. On the merits, the court of appeals reversed the declaratory judgment granted to the *Walker* plaintiffs, vacated the DHA remedial order, remanded for further proceedings, and continued the stay pending entry of a revised remedial order.

a. The court of appeals first ruled that respondents had standing to challenge the selection of sites in their neighborhoods. Pet. App. 11-15. It held that the use of a racial classification to select the sites was itself an injury sufficient to give respondents standing. *Id.* at 14. The court of appeals also concluded that, in light of "the potential for neighborhood disruption traceable to improperly managed public housing projects," respondents' assertion that their quality of life and property values would be diminished gave them standing to challenge the selection of the sites. *Id.* at 15.

b. The court of appeals also concluded that respondents had alleged an equal protection violation. Pet. App. 16-18. The requirement that public housing sites be selected in predominantly white neighborhoods, the court of appeals held, was an explicit racial classification, and thus subject to strict scrutiny. Because respondents did not challenge the existence of a compelling governmental interest, the court of appeals went directly to the narrow tailoring phase of strict scrutiny,

applying the five factors set forth in *United States* v. *Paradise*, 480 U.S. 149 (1987): "(1) the necessity for relief, (2) the efficacy of alternative remedies, (3) the flexibility and duration of relief, (4) the relationship of the numerical goals to the relevant market, and (5) the impact of the relief on the rights of third parties." Pet. App. 19. The court concluded that "[u]nder the balance of the *Paradise* factors, the [racial site selection] criterion is not narrowly tailored." *Id.* at 34.

In what turned out to be the dispositive portion of its analysis, the court of appeals held that the first two *Paradise* factors "weigh against race-conscious site selection" because alternative, race-neutral remedies were available. Pet. App. 22. The court of appeals rested that conclusion on its perception that the use of Section 8 certificates and vouchers had "not been given a fair try to prove their potential to desegregate" and that "other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing." *Ibid.* The court of appeals referred to statistics showing that, as DHA's Section 8 mobility program under its remedial order was getting underway between 1994 and 1996, there was a significant increase in "the number of Section 8 black families living in predominantly white areas." *Id.* at 25. The court stated that, "[b]ased on the relative success of DHA in moving blacks into predominantly white areas via its Section 8 program between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination." *Ibid.* The court of appeals stated that, with "increased funding for both more vouchers and the mobility program, more mobility counselors, and higher fair market exception

rents," *id.* at 26-27 (footnotes omitted), the Section 8 program—which it viewed as a "race-neutral remedial measure," *id.* at 26—could be even more successful at providing desegregated housing opportunities. The court also found that an explicit racial classification for the selection of sites was unnecessary because the selection of sites based upon geographic location or the poverty rate of persons living in the area could also achieve a desegregative result. *Id.* at 22, 27-28. The court of appeals also reasoned that, since the vast majority (up to approximately 92%) of the housing to be provided under the remedial orders would be Section 8 certificates and vouchers, it was "baffling to assume" that Section 8 vouchers could not satisfy "the district court's remedial goal" for the balance of the remedial housing. *Id.* at 31-32.

The court of appeals held that the third *Paradise* factor—"the flexibility and duration of relief" was "neutral in this case." Pet. App. 32 n.37. But the court held that "the relationship of the numerical goals to the relevant market"—the fourth *Paradise* factor—was not justified. *Id.* at 32-33. The district court had based the goal of placing half the families in DHA's programs in predominantly white areas on the ground that Dallas's population is approximately half white and half minority. The court of appeals faulted this rationale as overly broad, since the suit was brought on behalf of a class of black—not Hispanic—plaintiffs. The court of appeals found that the remedial order's definition of a "predominantly white" area—63% non-Hispanic white—was similarly flawed, since it was "based on the idea that public housing may not be placed in neighborhoods with higher concentrations of Hispanics." *Id.* at 32. The remedial goal, the court of appeals concluded, "should instead be directed toward placing public

housing participants in neighborhoods of their choice through a vigorous Section 8 program, non-black neighborhoods, census tracts in which no public housing currently exists, or non-poor neighborhoods." *Id.* at 32-33.

Finally, the court discussed the fifth *Paradise* factor —the impact on third parties—but appeared not to reach a clear holding regarding its application here. The court noted the various ways in which the district court had attempted to minimize the impact on third parties such as respondents. The court acknowledged that the district court had "ordered stringent criteria for the design and upkeep of the projects and for tenant selection," and that it had also provided for "the participation of neighboring community members, like [respondents], in planning the projects." Pet. App. 33. But, the court of appeals stated that, in "attempt[ing] to placate [respondents'] fears of deterioration in their neighborhoods," the remedial order "lends credibility to those fears." *Id.* at 34.

c. Having found that "[a]s applied to the facts of this case, the district court erred in employing a race-conscious remedy before utilizing race-neutral alternatives," Pet. App. 34-35, and that "it is premature to utilize such a last-resort measure," *id.* at 34, the court of appeals remanded to the district court "for further consideration," *ibid.*

ARGUMENT

Although in our view the decision of the court of appeals was mistaken, the court's opinion appears to rest in large part on a misapprehension of the facts of this case. Because the court's decision was made in an interlocutory setting, does not squarely conflict with a decision of any other court of appeals, and is to a great

extent fact-bound, review by this Court is not warranted.[6]

1. As this Court has held repeatedly, "[t]he controlling principle" of desegregation remedies "is that the scope of the remedy is determined by the nature and

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[6] Although petitioners have not presented it as a separate question, there is a substantial question whether the court of appeals erred in holding that respondents had standing to challenge the site selection criteria. The court of appeals ruled that "[t]he remedial order's explicit racial classification alone is sufficient to confer standing" on respondents. Pet. App. 12. As this Court has held, however, "even if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *United States* v. *Hays*, 515 U.S. 737, 743-744 (1995) (citation and internal quotation marks omitted). Respondents were not "personally denied equal treatment" by the use of race in the selection of sites for public housing. They were not denied housing or the opportunity to compete on an equal footing with any other group. They did not allege or prove that the use of the sites for public housing would deprive them of any contract or property rights or would be inconsistent with local zoning or other land use restrictions. Nor did they allege or prove an injury comparable to that recognized by this Court in its recent redistricting cases. *Shaw* v. *Reno*, 509 U.S. 630, 647-648, 650, 657 (1993), for example, held that a redistricting plan that segregates voters on the basis of race is harmful because it reinforces impermissible racial stereotypes and sends a message to elected representatives that they represent members of only one group. The court of appeals also accorded respondents standing based upon "the potential for neighborhood disruption traceable to improperly managed public housing projects." Pet. App. 15. But in light of the district court's undisturbed factual findings (see p. 7, *supra*), the mere "potential for neighborhood disruption" resulting from the construction of public housing is too speculative, too "conjectural or hypothetical" to constitute "injury in fact" to the respondents. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*) (citing *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); see also *United States* v. *Virginia*, 518 U.S. 515, 547 (1996); *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). This principle "means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977) (*Milliken II*); see also *United States* v. *Virginia*, 518 U.S. at 547. Courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I*, 418 U.S. at 746. Where policies traceable to a racially dual system persist, and continue to have a segregative effect, they must be "reformed to the extent practicable and consistent with sound" practices. *United States* v. *Fordice*, 505 U.S. 717, 729 (1992); see *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 458 (1979) (school officials have continuing obligation to dismantle racially dual school system).

2. The court of appeals accepted that "[t]he history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation," Pet. App. 4, and that a remedy for the victims of that discrimination was necessary. The court did not dispute that the district court's responsibility was to fashion a remedy that would root out and eliminate the unconstitutional discrimination and its vestiges. It held, however, that the remedy that the district court

adopted made unnecessary use of race. That conclusion was mistaken.

a. The court of appeals' key error consisted in its finding that the first two factors—"the necessity for relief" and the "efficacy of alternative remedies"—"weigh against race-conscious site selection." Pet. App. 22. In the analysis of these factors, the court placed greatest weight on what it believed to be the availability of Section 8 housing vouchers as an equally effective, but race-neutral, remedial mechanism. Indeed, it described the district court's findings that Section 8 vouchers under the remedial order had made significant progress in finding desegregative housing opportunities for black families as the "one overarching factual finding by the district court * * * that transcends the parties' objections to Section 8 as a remedial measure." *Id.* at 24. In light of what it viewed to be the success achieved by Section 8, the court stated that petitioners, HUD, and DHA "have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination." *Id.* at 25.

(i). Initially, in characterizing Section 8 as applied under the remedial order as a "race-neutral remedial measure," Pet. App. 26, the court of appeals appears to have misunderstood the ways in which Section 8 was used to achieve the desegregative results to which the court referred. The time period during which those results were being achieved—1994 to 1996—was the "time period that DHA's Section 8 mobility program was getting fully underway." *Id.* at 25. As the district court found, the mobility services provided in conjunction with the Section 8 housing vouchers are race-conscious in that they are provided only to African-American applicants and only to those Section 8

applicants who wish to find housing in predominantly white areas. *Id.* at 113-114; see *id.* at 224-225. Although the use of race in the Section 8 portion of the district court's remedy was different from its use in the public housing portion of the remedy, it cannot be said that one was race-neutral and the other race-conscious.

(ii). In addition, in concluding that there was "insufficient evidence" that race-conscious siting of public housing was necessary, the court of appeals failed to take account of undisturbed district court findings regarding the efficacy of the Section 8 program. The court stated that it would "neither accept nor attempt to reject" the district court's findings that

> there are not enough Section 8 units in predominantly white areas; among the available units there is a lack of three and four bedroom units; rents in predominantly white areas are too high to be covered even by Section 8's fair market exception rents; landlords do not want to participate in the Section 8 program; and Section 8 participants become frustrated in looking for housing in predominantly white areas and settle for housing in minority areas.

Pet. App. 24.[7] The court of appeals stated that it similarly would not disturb the district court's finding that

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[7] The district court's factual findings amplified on the difficulties that the court of appeals noted in the ability to use Section 8 vouchers as the sole remedial tool to achieve desegregation. See Pet. App. 145 (noting "limited success of Section 8," despite DHA's "ambitious and thorough program to search for and recruit willing landlords"), 146 (noting other barriers to ability of Section 8 recipients to find an apartment in white areas of Dallas), 147 ("[a]t least 80% of Section 8 families are frustrated in their search for housing

"rental contract requirements in predominantly white areas contain provisions that are difficult for Section 8 families to meet (*e.g.*, high security deposits, requirement of having held a job for the past year, *etc.*)." *Ibid.*

Those undisturbed factual findings should have been sufficient to establish that use of Section 8 vouchers alone could not remedy the past discriminatory siting of public housing in Dallas and that some race-conscious siting of public housing is necessary as a part of the remedy in this case. Those findings established that there were at least some substantial number of public housing families—*i.e.*, enough to fill the 474 new units of public housing at issue in this case, see Pet. App. 31—who would not be able to use Section 8 vouchers. Such families would be forced into the public housing that, because of the history of discrimination that the court of appeals recognized, would inevitably be located only in black neighborhoods. Thus, although the Section 8 remedy may be preferred by many families and could provide the largest portion of the remedy, it could not be sufficient to satisfy the district court's primary obligation under this Court's cases—to provide a complete remedy for the identified racial discrimination practiced by the City of Dallas and its agencies for many decades.

(iii). The court of appeals also erred in concluding (Pet. App. 27) that race-conscious public housing site selection was unnecessary because the use of race-neutral selection criteria, such as geography or the percentage of low-income persons residing in an area, could achieve a desegregative result. The constitutional violation here was the exclusion of public housing

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in white areas"), 164 (noting need for and scarcity of vacant three- and four-bedroom units).

not simply from certain geographic areas or from high-income areas, but from predominantly white areas. The use of non-racial site selection criteria would be successful in remedying *racial* discrimination only to the extent that they were surrogates for race.[8]

b. The court of appeals also erred elsewhere in its application of the *Paradise* factors.[9] Most significantly, with respect to the impact on third parties, the court appeared to rely at least in part on respondents' "fears

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[8] Indeed, such use of non-racial site selection criteria could perpetuate segregation. If the district court's use of non-racial site selection criteria had resulted in the building of *any* additional public housing units in African-American neighborhoods, the net effect would be a perpetuation of the constitutional violation—the continued concentration of public housing in African-American neighborhoods and the failure to provide fair housing opportunities to public housing residents. The district court's mandate was to provide desegregated housing opportunities—not additional segregated ones.

[9] The court of appeals correctly found that the third factor —"the flexibility and duration of relief"—"is neutral in this case." Pet. App. 32 n.37. With respect to the fourth factor— "the relationship of numerical goals to the relevant markets," *id.* at 32—the court of appeals found that the district court had erred in requiring that the new public housing be built in predominantly white areas and defining those areas as ones in which whites—excluding Hispanics—predominated. The undisputed facts in this case showed that the DHA had discriminated against Hispanics, as well as African-Americans, in the siting of public housing in Dallas. See *Walker III*, 734 F. Supp. at 1293 & n.14; *id.* at 1295-1297 & n.17. Even if that were insufficient to support the district court's order that public housing be sited in non-Hispanic white areas, however, the result should have been at most a remand to alter the siting criteria to refer to non-African-American, rather than non-Hispanic white, areas. It should not have led to the court of appeals' much broader remand rejecting the use, at this time, of any racial siting criteria.

of deterioration in their neighborhoods" that would purportedly follow the building of public housing there. Pet. App. 34. The court recognized that the district court had ordered "stringent criteria for the design and upkeep of the projects and for tenant selection" and had "called for the participation of neighboring community members, like [respondents]" in order to ensure that the projects would be satisfactorily designed and maintained. *Id.* at 33. In addition, it is significant that respondents do not own the property on which the public housing would be built, and that that housing will be required to satisfy all zoning and other legal requirements. In light of the safeguards proposed by the district court, as well as respondents' fundamental lack of a legal basis to complain of how a nearby property owner chooses to use its property within whatever land-use and other legal regulations apply to that property, it cannot be said that the likely impact on innocent third parties cuts against the district court remedy.

3. Although the court of appeals misapprehended the facts of this case in applying the *Paradise* factors to the district court's remedial order, that error does not warrant further review.

a. First, the court of appeals' ruling that the site selection requirement was not narrowly tailored resulted primarily from its conclusion that, because the Section 8 program was a race-neutral alternative that had already shown "promising results" as a desegregation remedy and that "could be even more successful" with additional resources, Pet. App. 26-27, there was "insufficient evidence to show that the district court's race-conscious site-selection criterion is necessary to remedy the effects of past discrimination." *Id.* at 25. Although we disagree with the conclusion that the

evidence was insufficient in that regard, the court's misapprehension of the facts in this case does not warrant review by this Court.

Second, the court of appeals remanded the case to the district court for further proceedings and modification of the remedy order in accordance with its opinion. We do not read that opinion to preclude the district court from reimposing a race-conscious site selection requirement if it finds, based upon a more complete record, that the race-neutral alternatives posited by the court of appeals will not, in fact, fully remedy the violation. In rejecting the district court's finding that the Section 8 program alone was not an adequate remedy, the court of appeals emphasized, for example, that DHA's mobility program had been in effect for only two years at the time of the 1996 evidentiary hearing. See Pet. App. 22. The mobility program has now been in place for an additional three years, and the composite results for the full five years should shed more light on the adequacy of Section 8 as a complete remedy in the circumstances of this case. Similarly, the district court on remand could develop a factual record on the likely results of alternative public housing site selection criteria, such as geography or poverty rate. It could then determine whether such alternatives would lead to the development of new public housing that would dismantle, and not perpetuate, the racially segregated system of public housing that now exists in Dallas.

Third, the decision below does not squarely conflict with the decision of any other court of appeals. See Pet. 12-13. To be sure, the Second and Seventh Circuits have approved similar remedies, requiring the development of subsidized housing opportunities in predominantly white residential areas. See *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir.

1987), cert. denied, 486 U.S. 1055 (1988)[10]; *Gautreaux* v. *Pierce*, 690 F.2d 616, 622-623 (7th Cir. 1982); *Gautreaux* v. *Chicago Hous. Auth.*, 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922 (1971); see also *Hills* v. *Gautreaux*, 425 U.S. 284, 299, 301 (1976) (noting that it was "entirely appropriate" and "supportive of well-established federal housing policy" to require the creation of housing opportunities in suburban Chicago as a remedy for the unlawful concentration of most public housing in poor, black neighborhoods of Chicago). But neither *Yonkers* nor the *Gautreaux* decisions considered a challenge to such a remedy on the ground that it was not narrowly tailored to serve a remedial purpose and therefore violated the Equal Protection Clause.

Nor do the other older court of appeals decisions—the most recent of them decided 17 years ago—cited by petitioners (see Pet. 13) squarely conflict with the decision below. *Otero* v. *New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973), *Shannon* v. *HUD*, 436 F.2d 809, 821-822 (3d Cir. 1970), and *Alschuler* v. *HUD*, 686 F.2d 472 (7th Cir. 1982), all concluded that HUD (or, in the case of *Otero*, the New York City Housing Authority), has an affirmative obligation to consider the impact of proposed housing projects on the racial composition of the surrounding areas. But none of these decisions applied narrow tailoring analysis to a

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[10] The court of appeals here erroneously cited *Yonkers* as an example of geographic, rather than race-conscious, site selection criteria. See Pet. App. 27. As the Second Circuit recognized, East Yonkers, the geographic area designated for public housing, is the predominantly white area of Yonkers, from which subsidized housing had been excluded. See 837 F.2d at 1184 (referring to requirement that the City select public housing sites in "non-minority" areas).

site selection requirement like the one in the remedy order in this case or considered the efficacy of alternative means of promoting integrated housing. *Otero* did not concern site selection at all, but rather the selection of tenants for a new housing project.[11] *Shannon* held that HUD was required by the Fair Housing Act and by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to consider the effect of a proposed housing project on the racial composition of the surrounding area, but did not concern an affirmative requirement that housing be built in any area based upon race. And *Alschuler* affirmed a district court's denial of a preliminary injunction to block the development of a new housing project, holding that HUD had adequately considered the racial impact of the project before approving it.

Finally, the court of appeals expressly declined to consider the validity of HUD's site and neighborhood standards, which require the consideration of race in HUD's consideration of proposed public housing sites. See 24 C.F.R. 941.202(c). Thus, contrary to petitioners' contention (Pet. 9-12), the decision below does not warrant review because of any perceived inconsistency with those standards.

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[11] The holding in *Otero* was substantially limited by the Second Circuit's subsequent decision in *United States* v. *Starrett City Associates*, 840 F.2d 1096, 1100-1103 (2d Cir.), cert. denied, 488 U.S. 946 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999